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No. 02-9410

IN THE

Supreme Court of the United States

MICHAEL D. CRAWFORD,

Petitioner,

v.

WASHINGTON,

Respondent.

On Writ of Certiorari to the Supreme Court of Washington

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF PETITIONER

DAVID M. PORTER
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2500

JEFFREY T. GREEN*
ROBERT N. HOCHMAN
MATTHEW J. PRESS
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

July 24, 2003

* Counsel of Record

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MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Amici curiae the National Association of Criminal Defense Lawyers ("NACDL"), the American Civil Liberties Union and the ACLU of Washington ("ACLU") respectfully request leave of this Court to file the following Brief in the above captioned matter. In support of their motion, NACDL and the ACLU state as follows:

1. NACDL and the ACLU requested the consent of both petitioner and respondent to file their *amici curiae* brief in this case. The petitioner granted his consent in writing. Petitioner's written consent has been filed with the Court. Respondent refused its consent.

2. NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. NACDL's objectives include the promotion of the proper administration of justice. To promote these goals, NACDL has frequently appeared before this Court as *amicus curiae*.

3. NACDL believes that its familiarity with the courtroom level application of this Court's Confrontation Clause rulings will aid this Court's understanding of the issues presented in this case. This brief focuses on the practical consequences of this Court's decisions for criminal defendants and defense attorneys.

4. The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington is its statewide affiliate. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

5. The ACLU recognizes that this case raises the important question of how the vital protections of the Confrontation Clause should be implemented. The ACLU believes this brief, which focuses on how consistent application of the right to confront one's accusers aids the accuracy and fairness of the criminal process, will aid in this Court's consideration of this case.

Respectfully submitted,

DAVID M. PORTER
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2500

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ROBERT N. HOCHMAN
MATTHEW J. PRESS
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

July 24, 2003

* Counsel of Record

QUESTIONS PRESENTED

I. Whether the Confrontation Clause of the Sixth Amendment permits the admission against a criminal defendant of a custodial statement by a potential accomplice on the ground that parts of the statement "interlock" with the defendant's custodial statement.

II. Whether this Court should reevaluate the Confrontation Clause framework established in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and hold that the Clause unequivocally prohibits the admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF TESTIMONIAL OUT-OF-COURT STATEMENTS AGAINST A DEFENDANT UNLESS THE DEFENDANT HAS BEEN PROVIDED AN OPPORTUNITY TO CONFRONT THE WITNESS	4
A. Confrontation As A Procedural Mechanism For Discovering Truth	5
B. The *Roberts* Framework Fails To Protect The Values Of The Confrontation Clause Because Its Inherent Subjectivity Produces Inconsistent Results	8
C. The Testimonial Approach Provides Greater Certainty And Is More Consistent With The Text And Values Of The Confrontation Clause	22
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page
Barrow v. *State*, 749 A.2d 1230 (Del. 2000)	18
Bourjaily v. *United States*, 483 U.S. 171 (1987)	23
Brooks v. *State*, 787 So.2d 765 (Fla. 2001)	18
Brown v. *State*, 953 P.2d 1170 (Wyo. 1998)	16, 17, 18, 19
Bruton v. *United States*, 391 U.S. 123 (1968)	2, 7, 10, 24
Calvert v. *Wilson*, 288 F.3d 823 (6th Cir. 2002)	16
Coy v. *Iowa*, 487 U.S. 1012 (1988)	4
Cruz v. *New York*, 481 U.S. 186 (1987)	2, 12, 24
Douglas v. *Alabama*, 380 U.S. 415 (1965)	2, 9, 10, 24
Dowdell v. *United States*, 221 U.S. 325 (1911)	10
Dutton v. *Evans*, 400 U.S. 74 (1970)	1, 6
Earnest v. *Dorsey*, 87 F.3d 1123 (10th Cir. 1996)	18
Gabow v. *Commonwealth*, 34 S.W.3d 63, 78-79 (Ky. 2000)	18
California v. *Green*, 399 U.S. 149 (1970)	5, 6
Idaho v. *Wright*, 497 U.S. 805 (1990)	*passim*
Kentucky v. *Stincer*, 482 U.S. 730 (1987)	4
Lee v. *Illinois*, 476 U.S. 530 (1986)	2, 9, 12, 24
Lilly v. *Virginia*, 527 U.S. 116 (1999)	*passim*
Maryland v. *Craig*, 497 U.S. 836 (1990)	*passim*
Mattox v. *United States*, 156 U.S. 237 (1895)	1, 6, 24
Motes v. *United States*, 178 U.S. 458 (1900)	10
Ohio v. *Roberts*, 448 U.S. 56 (1980)	*passim*
People v. *Campbell*, 721 N.E.2d 1225 (Ill. Ct. App. 1990)	19
People v. *Schutte*, 613 N.W.2d 370 (Mich. Ct. App. 2000)	16, 17, 18, 19
People v. *Thomas*, 730 N.E.2d 618 (Ill. App. Ct. 2000)	16, 17, 18
Pointer v. *Texas*, 380 U.S. 400 (1965)	4
Reynolds v. *United States*, 98 U.S. 145 (1878)	24

TABLE OF AUTHORITIES—continued

	Page
State v. *Campbell*, 30 S.C.L. (1 Rich.) 124 (1844), *available at* 1844 WL 2558	6
State v. *Crawford*, 54 P.3d 656, 663 (Wash. 2002)	1, 2, 15, 19
State v. *Franco*, 950 P.2d 348 (Or. Ct. App. 1997)	16, 17
State v. *Marshall*, 737 N.E.2d 1005 (Ohio Ct. App. 2000)	17
State v. *Murillo*, 623 N.W.2d 187 (Wis. Ct. App. 2000)	19, 21
State v. *Sheets*, 618 N.W. 2d 117 (Neb. 2000)	18
Stevens v. *People*, 29 P.3d 305, 315 (Colo. 2001)	18, 19, 20
Taylor v. *Illinois*, 484 U.S. 400 (1988)	5
Tennessee v. *Street*, 471 U.S. 409 (1985)	4
United States v. *Castelan*, 219 F.3d 690 (7th Cir. 2000)	17, 20
United States v. *Centracchio*, 265 F.3d 518 (7th Cir. 2001)	17, 18, 20
United States v. *Dolah*, 245 F.3d 98 (2d Cir. 2001)	18
United States v. *Gomez*, 191 F.3d 1214 (10th Cir. 1999)	17, 18, 19
United States v. *Inadi*, 475 U.S. 387 (1986)	23
United States v. *Papajohn*, 212 F.3d 1112 (8th Cir. 2000)	17
White v. *Illinois*, 502 U.S. 346 (1992)	1, 6, 9, 22, 23
Wright v. *State*, 440 S.E.2d 7 (Ga. 1994)	19

CONSTITUTION

U.S. Const., amend. VI	4

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES — Page

3 William Blackstone, *Commentaries on the Laws of England* (1768) 7
Akhil R. Amar, *The Constitution and Criminal Procedure* (1997) 22
John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797 (2001) ... 22
Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557 (1992) 22
Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. Rev. 537 (2003) 22
Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011 (1998) 21, 22
Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev. 1171 (2002) 22, 25

INTEREST OF *AMICI CURIAE*[1]

The interest of *amici* is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

In this case, the State of Washington secured the conviction of Petitioner by using a statement of his wife and accomplice, Sylvia Crawford, given in response to police questioning while in police custody. Sylvia did not appear at trial and was never subject to cross-examination, was never observed by the jury, and was never required to offer her statement inculpating Petitioner while in his presence. The substance of her statement helped the State defeat Petitioner's self-defense theory. See *State* v. *Crawford*, 54 P.3d 656, 663 (Wash. 2002) (reproducing Sylvia's testimony discussing whether the victim had reached for a knife before or after Petitioner stabbed him). While Sylvia inculpated herself in the crime, her statement also shifted blame from herself to her husband by clearly identifying him as the assailant, not her.

Admission of statements like Sylvia's strikes at the core of the Confrontation Clause. As this Court has repeatedly recognized, the right of confrontation was designed to prevent trial and conviction by witness affidavit obtained by investigators without affording the accused the opportunity to confront the witness. *Lilly* v. *Virginia*, 527 U.S. 116, 124 (1999) (plurality opinion); *White* v. *Illinois*, 502 U.S. 346, 362 (1992) (Thomas, J., concurring); *Dutton* v. *Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); *Mattox* v. *United States*, 156 U.S. 237, 242 (1895). Sylvia's statement closely

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief.

resembles that old and rejected model. That is why this Court has repeatedly held that a witness statement, made to the police investigating a crime, and inculpating the defendant must be excluded. *Lilly*, *supra*; *Idaho* v. *Wright*, 497 U.S. 805 (1990); *Cruz* v. *New York*, 481 U.S. 186 (1987); *Lee* v. *Illinois*, 476 U.S. 530 (1986); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Bruton* v. *United States*, 391 U.S. 123, 133-34 (1968).

Nonetheless, the Washington Supreme Court, applying the Confrontation Clause framework established by this Court in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), allowed Sylvia's statement to be admitted against Petitioner at trial. The *Roberts* framework permits a judge to admit an unavailable witness's out-of-court statement if the statement contains "particularized guarantees of trustworthiness." *Id.* at 66. According to the Washington Supreme Court, Sylvia's statement could go to the jury without the rigors of adversarial testing, and without Sylvia appearing in the courtroom and standing before Petitioner and the jury when offering her statement, because the court itself had deemed the statement sufficiently trustworthy. The Washington Supreme Court based its reliability finding on its view that "Sylvia's and [Petitioner's] statements [to the police] are virtually identical," and hence the statements "interlock[]." *Crawford*, 54 P.3d at 664; see also *id.* at 663 (whenever an accomplice's statement to the police interlocks with the defendant's statement to the police, it is sufficiently reliable to be admitted even when the accomplice is unavailable to appear at trial) (citing *State* v. *Rice*, 844 P.2d 416, 427 (Wash. 1993)).

The Washington Supreme Court's decision is but one example of the inconsistency and indeterminacy that plagues the *Roberts* framework. Lower courts have proven unable to serve the values of the Confrontation Clause within the *Roberts* framework. That framework is too vague, allowing too much judicial subjectivity to determine the scope of this

fundamental constitutional right in particular cases. This case presents a particularly powerful example of the problem. For this Court's caselaw attempting to refine and apply the *Roberts* framework leaves no room for doubt: an unavailable accomplice's custodial statement to the police investigating the crime may not be admitted against a defendant merely because that statement "interlocks" with the defendant's own custodial statement to the police. And "interlocking" statements are hardly the only cases that have produced inconsistent results under the *Roberts* framework. It is thus time for this Court to abandon *Roberts*.

In place of *Roberts* this Court should adopt what has been called the "testimonial" approach. The testimonial approach would prohibit the admission of out-of-court statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial (unless the defendant has the opportunity to confront the witness). The testimonial approach grows out of the Confrontation Clause's central purpose of preventing trial by affidavit. In addition, the Confrontation Clause's language more naturally supports the testimonial view than the current reliability-based approach of *Roberts*. Of particular importance to *amici*, the testimonial approach would not require the trial court to make the inherently subjective finding that a statement is or is not trustworthy, a task practically guaranteed to produce inconsistency even in what should be simple cases. Instead, by focusing on the purpose for which the statement was made and recorded, the most common cases become simple, and even the hard cases would be more consistently resolved.

ARGUMENT

THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF TESTIMONIAL OUT-OF-COURT STATEMENTS AGAINST A DEFENDANT UNLESS THE DEFENDANT HAS BEEN PROVIDED AN OPPORTUNITY TO CONFRONT THE WITNESS.

The Confrontation Clause of the Sixth Amendment, applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI; *Pointer* v. *Texas*, 380 U.S. 400 (1965). The Confrontation Clause's mission is to "advance the accuracy of the truth determining process in criminal trials." *Tennessee* v. *Street*, 471 U.S. 409, 415 (1985) (citing *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970)). The "confrontation" between the witness and the accused at trial is not only a deeply felt requirement for a just criminal process, *Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988), but provides concrete and practical aids for determining the truth. *Kentucky* v. *Stincer*, 482 U.S. 730, 739 (1987) (referring to the Confrontation Clause as a "functional" aid in the search for truth); *Maryland* v. *Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (stating the Confrontation Clause "guarantees specific trial procedures that were thought to *assure* reliable evidence" would support criminal convictions). As a review of recent lower court caselaw, including this case, indicates, the *Roberts* framework too often fails to ensure juries can evaluate the truthfulness of witness testimony with the aids the Confrontation Clause was intended to provide. By contrast, the testimonial approach well arms the jury for its critical truth-finding task.

A. Confrontation As A Procedural Mechanism For Discovering Truth.

A witness who provides testimony in court, standing before the jury and in front of the accused cannot help but be impressed with the potentially serious consequences of his or her words. Requiring the witness to take an oath before testifying is but one way the trial process impresses upon the witness the importance of speaking truthfully. *Craig*, 497 U.S. at 845-46 (quoting *California* v. *Green*, 399 U.S. 149, 158 (1970)). By requiring the witness to stand before the defendant, the confrontation right taps into "something deep in human nature" that makes lying about the deeds of another more difficult "to his face than behind his back." *Coy*, 487 U.S. at 1017-20. And the jury, in whose presence all of this takes place, has a full opportunity to observe the demeanor of the witness as he or she delivers a claim in the defendant's presence that the defendant's conduct warrants the censure of the community and a loss of liberty. *Green*, 399 U.S. at 158.

Most prominently in the Anglo-American tradition, the confrontation between witness and accused enables counsel for the accused to cross-examine the witness, "the greatest legal engine ever invented for the discovery of truth." *Id.* at 158. Cross-examination enables the defendant to explore inconsistencies between a witness' testimony and other evidence, probe any biases that may have led the witness to distort the truth, and open lines of inquiry that the State, for whatever reason, may have neglected. *Taylor* v. *Illinois*, 484 U.S. 400, 411-12 (1988) (stating "cross-examination[] minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony"). The highest court in South Carolina summed up the practical effect of the right of confrontation nearly 160 years ago, and the words remain as true today as they were then: The right of confrontation "expresses well the searching process and practical test furnished and intended by this rule of law; in order to correct any misconception of facts, to elicit

truth, and justify the severe retribution awarded in cases of clear guilt." *State* v. *Campbell*, 30 S.C.L. (1 Rich.) 124 (1844), *available at* 1844 WL 2558, at *1.

The "rigorous testing" the Confrontation demands of witness testimony against the accused, *Craig*, 497 U.S. at 845, stands in sharp contrast to the "paradigmatic evil the Confrontation Clause was aimed at," *Dutton*, 400 U.S. at 94 (Harlan, J., concurring), government presentation of witness testimony against the accused by affidavit. "[T]he particular vice that gave impetus to the confrontation clause was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining [English] magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *Green*, 399 U.S. at 156; *Lilly*, 527 U.S. at 124 (plurality opinion) (referring to the "particular abuse [of] ... prosecuting a defendant through the presentation of *ex parte* affidavits"); *White*, 502 U.S. at 362 (Thomas, J., concurring) (stating "the primary purpose of the [Confrontation] Clause was to prevent the abuses that had occurred in England"); *Mattox*, 156 U.S. at 242 (1895) ("The primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness...."). When the government offers witness testimony through affidavit, it avoids all the practical devices for evaluating witness credibility the Confrontation Clause intends the jury to have at its disposal.

When viewed from this combination of practical and historical perspectives, the Confrontation Clause serves a value beyond the important and much-recognized purpose of enhancing the reliability of witness testimony and enabling the jury to evaluate truthfulness. The Confrontation Clause, like other provisions of the Bill of Rights, limits the power of the State. The Confrontation Clause prevents the government

from presenting witness testimony against the accused in a form other than in open court, where the accused may "confront" the witness. This limits the power of the government to shape witness testimony, intentionally or otherwise, by exploring only certain lines of inquiry. 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768) (referring to the "artful or careless scribe" who "may make a witness speak what he never meant"). This limits the power of the government to influence the witness through secret deals. And this limits the power of the government to punish the defendant on the basis of an accusation lodged by a witness unwilling to condemn the defendant to his face. *Id.* at *373 (noting that a witness "may frequently depose in private, which he will be ashamed to testify in a public and solemn trial"). The lessons drawn from the rejected *ex parte* affidavit procedure, lessons constitutionalized in the Confrontation Clause, include the recognition that untested witness testimony can mislead the jury, undermining the search for truth even more than no testimony at all.

The Confrontation Clause thus imposes a procedural limitation on the State: a defendant's liberty may not be restrained on the basis of witness testimony unless the defendant has had the opportunity to confront the witness. *Craig*, 497 U.S. at 845 ("Confrontation Clause ... ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."). And this rule applies even when the "truth" may well be better served by ignoring the procedural burden the Confrontation Clause imposes. *Bruton*, 391 U.S. at 133-34 (rejecting right of prosecution to use codefendant's confession implicating defendant at joint trial even when jury finds codefendant guilty thus demonstrating jury's view that confession was reliable).

Petitioner's case represents the closest our adversarial system of justice can come to reproducing the trial by

affidavit process. *Lilly*, 527 U.S. at 137 (plurality opinion) (describing accomplice custodial confession as "implicat[ing] the core concerns of the old *ex parte* affidavit practice"); *Id.* at 143 (Scalia, J., concurring). Petitioner is a criminal defendant who was convicted on the basis of a statement given out of his presence to the police investigating the case. This statement was read to the jury despite the fact that the accused never had the opportunity to confront the witness. Any approach to the Confrontation Clause that permits such evidence to be admitted against the accused fails on every level. It fails at the historical level, by permitting the very evil the Confrontation Clause was designed to prevent. It fails at the political level, by restoring to the State the power to obtain convictions based on untested witness testimony. And it fails on the practical level, by permitting the jury to hear testimonial evidence without providing it with the tools it needs to determine the truth. Cases involving witness statements to law enforcement investigating the crime are thus the easy cases; cases involving these statements should yield maximum consistency and protection if the Confrontation Clause is operating properly.

B. The *Roberts* Framework Fails To Protect The Values Of The Confrontation Clause Because Its Inherent Subjectivity Produces Inconsistent Results.

The Confrontation Clause, under this Court's highly subjective framework set forth in *Ohio* v. *Roberts*, *supra*, is not functioning properly. To be sure, the outcome of this Court's caselaw has been consistent. This Court has uniformly refused to allow witness statements inculpating the defendant to be admitted against the accused at trial unless the defendant has had the opportunity to "confront" the witness. But even as this Court has been consistent in applying *Roberts* to these paradigm statements requiring confrontation, it has done so without stating a clear rule. Instead, it has remained within the reliability-based framework of *Roberts*.

As a result, even this Court's consistently correct results have sometimes turned on a single vote. *Lee* v. *Illinois*, 476 U.S. 530 (1986) (five-to-four decision excluding codefendant confession); *Idaho* v. *Wright*, 497 U.S. 805 (1990) (five-to-four decision finding child statements to pediatrician lacked sufficient indicia of reliability to be admissible). Thus this Court's own decisions reflect how the subjective reliability inquiry will lead reasonable judicial minds to reach different conclusions.

And lower courts applying *Roberts* are, in fact, reaching widely divergent and irreconcilable conclusions. Lower courts often admit into evidence witness statements to the police inculpating the defendant, the very statements that strike at the core of the Confrontation Clause and that this Court has consistently recognized requires confrontation. The failure of *Roberts*, and this Court's caselaw applying it, to guide the lower courts to the historically correct results, or even to a consistent method of analysis, counsels in favor of its replacement. Three Justices of this Court have suggested that *Roberts* provides a misguided approach. *Lilly*, 527 U.S. at 140-43 (Breyer, J., concurring); *White*, 502 U.S. at 362 (Thomas, J., concurring). This Court now squarely has the question of *Roberts*' continued utility and consistency with the Sixth Amendment's text, history and purposes before it. This Court should abandon the *Roberts* framework as a failure on its own terms.

1. This Court's Decisions Uniformly Reject The Admission Of Statements Functionally Equivalent To The Ex Parte *Affidavit.* In *Douglas*, an accomplice of the defendant refused to testify when called to the stand. With the accomplice still on the stand, and in the presence of the jury, the prosecutor then read a confession that had allegedly been signed by the accomplice and that inculpated the defendant in the crime. 380 U.S. at 416-17. This Court, without qualification held that "petitioner's inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-

examination secured by the Confrontation Clause." *Id.* at 419. In so stating, this Court remained consistent with the absolute position it took with respect to the Phillipine Bill of Rights (which contains a provision that is "substantially ... the 6th Amendment"): the right of confrontation "intends to secure the accused ... the right to be tried, so far as facts provable by witnesses are concerned, by *only* such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination." *Dowdell* v. *United States*, 221 U.S. 325, 329-30 (1911) (emphasis added). And *Dowdell* had remained true to this Court's statement in *Motes* v. *United States*, 178 U.S. 458, 473-74 (1900), which referred to the "absolute" rule that the accused enjoy the right to "examine[] and cross-examine[] before the jury" witnesses against him.

This Court's firm approach in favor of the confrontation procedure reflected its understanding of the importance of the confrontation right to the accused. As this Court well understands, the kind of secret, untestable testimony of a witness that the Confrontation Clause was designed to prevent can, if admitted, be "devastating" to a defense. *Bruton*, 391 U.S. 136. Indeed, such statements are so devastating that this Court in *Bruton* prohibited their admission in a joint trial even when the jury was pointedly instructed to disregard the accomplice's confession when considering the defendant's guilt.

Roberts marked a shift away from the strict approach the Court had followed with respect to out-of-court witness statements, at least in word if not deed. In *Roberts*, this Court permitted the prosecution to present at trial the statements of a witness against the accused made at the accused's preliminary hearing, where the accused had, in effect, cross-examined the witness. In the process, this Court established a general framework for analyzing when the Confrontation Clause permits the admission of an out-of-court statement of a witness against a criminal defendant. Under the *Roberts*

formula, the out-of-court statement is admissible if it bears adequate "indicia of reliability." *Roberts*, 448 U.S. at 66.

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id.

This new framework imposed two subtle, but significant, shifts in emphasis for Confrontation Clause analysis. First, *Roberts* characterized "face-to-face confrontation at trial" as a "preference," not a constitutional command. *Id.* at 63. *Craig*, 497 U.S. at 849. Second, the *Roberts* framework placed "reliability" alone at the center of the analysis. See also, *Craig*, 497 U.S. at 845 (characterizing reliability as the "central concern of the Confrontation Clause"). This Court imposed this new framework to "respond[] to the need for certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66.

Despite *Roberts*' promise of "certainty" in the application of the Confrontation Clause, this Court has, since *Roberts*, on four occasions been forced to consider how to apply the *Roberts* framework to the most straightforward cases: those involving a witness statement that functionally resembles the *ex parte* affidavit. In each case, this Court has properly rejected the admission of the statement. And the Court in its most recent case most forcefully indicated that the Confrontation Clause does not permit the admission of such a statement. But in each case, this Court has done so while remaining within the *Roberts* framework, and thus on each occasion this Court has allowed the possibility that the Clause might, in the proper case, permit the admission of what is effectively an *ex parte* affidavit.

Lee, the case most similar to Petitioner's, involved the admission of a codefendant's confession to a double murder

because the confession was said, by the lower court, to "interlock" with that of the defendant. *Lee*, 476 U.S. at 538-39. This Court reversed, concluding that the "discrepancies between the [confessions were] not insignificant." *Id.* at 545. Despite repeatedly emphasizing the "presumptive unreliability" of codefendant confessions implicating the accused, *id.* at 541-43, 545, the Court specifically stated that that "presumption may be rebutted." *Id.* at 543. The Court did not, however, specify exactly what could overcome the presumption. Rather, it merely noted that "when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased." *Id.* at 545.

In *Cruz*, this Court held fast to the rule of *Bruton* and refused to allow a codefendant's confession implicating the defendant to be admitted in a joint trial, even when the jury was properly instructed not to consider the codefendant's confession as evidence against the defendant, and even when the defendant had also confessed and the two confessions "interlocked." Yet, once again, the Court suggested that the statement it excluded might conceivably be admitted consistent with the Confrontation Clause. After explaining why the fact that the confessions "interlocked" did not alter the rule of *Bruton*, this Court said "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him...." *Cruz*, 481 U.S. at 193-94.

Wright involved the admission of statements of the defendant's youngest daughter and alleged victim of abuse to a pediatrician made while the daughter was in the police's protective custody. *Wright*, 497 U.S. at 809-10. This Court held that the witness's untested statement was not sufficiently reliable to be admitted. *Id.* at 826-27. But the Court reached this conclusion not as a categorical matter, but quite the opposite. The Court emphasized that the reliability of a

witness's out-of-court statement should be evaluated in light of "the totality of the circumstances," *id.* at 826, thus making clear that a case-by-case approach was commanded. This Court did focus that inquiry somewhat, however, making clear that the only circumstances relevant to the statement's reliability are those surrounding the making of the statement itself; corroborating evidence cannot be used to support the reliability of an out-of-court witness statement. *Id.* at 822-24.

Finally, this Court most recently decided in *Lilly* that a codefendant's confession to the police implicating himself and the defendant in a crime could not be admitted against the defendant. This Court went further toward a categorical rule than it had since instituting the *Roberts* framework, stating that:

> It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old *ex parte* affidavit practice—that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Lilly, 527 U.S. at 137 (plurality opinion). That is, when it comes to statements that function like *ex parte* affidavits (most commonly, the custodial confession of a codefendant), this Court has adopted something just short of a categorical rule against their admission. According to *Lilly*, such statements, even though against penal interest under recognized hearsay law, are not a "firmly rooted" hearsay exception that might be admitted on that ground under *Roberts*. *Lilly*, 527 U.S. at 134 (plurality opinion). Instead, if they are to come into evidence at all, it would have to be under the second prong, the amorphous residual trustworthiness prong. And with respect to general reliability,

this Court has indicated that such statements are "highly unlikely" to be permissible. *Id.* at 137 (plurality opinion).

Indeed, after *Lilly*, it is difficult to imagine what "highly unlikely" circumstances would render statements similar to *ex parte* affidavits sufficiently reliable to warrant their admission. For *Lilly* rejected the suggestion in *Lee* and *Cruz* that a codefendant's confession might draw sufficient reliability from its overlap with the defendant's own admissible confession to be admissible under the *Roberts* framework. Relying on its previous decision in *Idaho* v. *Wright*, this Court flatly stated that it had "squarely rejected the notion that 'evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness.'" *Lilly*, 527 U.S. 137-38 (plurality opinion) (quoting *Wright*, 497 U.S. at 822). Since a defendant's confession that "interlocks" with a codefendant's confession is nothing but a particular item of "evidence corroborating the truth of [the] hearsay statement" (namely, the codefendant's confession), under *Lilly* and *Wright* courts must disregard the defendant's own confession when determining whether the codefendant's statement is sufficiently reliable to be admitted. No matter how much the confessions "interlock" and no matter how much other evidence corroborates the *ex parte* affidavit-like statement, all of that is "irrelevant" to admissibility. *Lilly*, 527 U.S. at 137 (plurality opinion).

Despite all of this, the plurality opinion in *Lilly* nowhere states that custodial confessions of an accomplice are always inadmissible unless the accomplice testifies at trial. To the contrary, by once again reaffirming the *Roberts* framework, and by emphasizing that "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness," *Lilly*, 527 U.S. at 138 (plurality opinion), this Court once again left open the possibility that

even an accomplice's custodial confession might, in the appropriate circumstances, pass the test.[2]

2. This Court's Adherence To The Roberts *Framework Causes Confusion In The Lower Courts.* Despite the fact that this Court has not indicated what facts will render an absent codefendant's statement to investigators admissible consistent with the Confrontation Clause, the lower courts, relying on the *Roberts* framework, all too frequently allow such statements to be admitted against the accused. What should be a straightforward application of the Confrontation Clause has been, in the lower courts, anything but. Lower courts, engaging in the inherently subjective inquiry into the "reliability" of statements that resemble the *ex parte* affidavit have produced results that are inconsistent, and at odds with the core values and purpose of the Confrontation Clause.

This very case presents a prime example. Sylvia Crawford's statement was produced under circumstances closely resembling the *ex parte* affidavit procedure. Yet the Washington Supreme Court, speeding past the fact that her statement was "presumed unreliable," focused its inquiry on the search for "indicia of reliability" that would permit the statement to be introduced. *State* v. *Crawford*, 54 P.3d 656, 663 (Wash. 2002). That is, despite this Court's repeated emphasis on the evil of the *ex parte* affidavit procedure, the Washington Supreme Court remained focused on the *Roberts*-mandated quest for "indicia of reliability." And all the Washington Supreme Court needed to satisfy itself that the statement was sufficiently "reliable" was the overlap between Sylvia's statement and Petitioner's confession. It is hard to imagine a more clear indication of how malleable the *Roberts*

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[2] Justice Scalia's concurring opinion rejects the *Roberts* approach and accepts that custodial accomplice confessions are automatically barred under the Confrontation Clause. *Lilly*, 527 U.S. at 143 (Scalia, J., concurring).

"reliability" inquiry is, and how poorly it serves the values of the Confrontation Clause.

Numerous other cases have followed a similar pattern. Lower courts pay little heed to the historical incongruity of admitting what are the functional equivalents of *ex parte* affidavits, and press ahead with the search for "indicia of reliability." The "presumption" of unreliability has lost any meaningful force after 23 years of subjective inquiry into reliability. It is little more than a requirement that the State characterize the statement as possessing as many factors as possible that courts have in the past identified as supporting a statement's reliability. The result is that absent codefendant statements that even this Court's caselaw clearly indicates should be excluded from evidence, are admitted, with devastating effect. *Calvert* v. *Wilson*, 288 F.3d 823, 831-32 (6th Cir. 2002) (finding state court's admission of codefendant custodial statement, made in response to police officer's leading questions, violates clearly established federal law as determined by this Court).

A review of the cases shows just how malleable the various factors can be. In Michigan, if a codefendant's statement was made "voluntarily" to the police, and if the codefendant was free to leave throughout the interview, then the statement inculpating the defendant and the codefendant is admissible against both. *People* v. *Schutte*, 613 N.W.2d 370, 375-76 (Mich. Ct. App. 2000). Likewise in Illinois. *People* v. *Thomas*, 730 N.E.2d 618, 626 (Ill. App. Ct. 2000). In Oregon, however, it is fine *not* to be free to leave, so long as the court determines that the witness is still speaking "voluntarily" to the investigating officer. *State* v. *Franco*, 950 P.2d 348, 352 (Or. Ct. App. 1997). Wyoming appears in line with Oregon, at least when the statement was initially volunteered, and continued "voluntarily" after *Miranda* warnings were issued. *Brown* v. *State*, 953 P.2d 1170, 1179-80 (Wyo. 1998).

Michigan, Illinois and Oregon all prefer statements emerging from the defendant himself without prodding by questions from the officer, though Oregon thinks it is fine to ask a single "basic, non-leading question." *Franco*, 950 P.2d at 352; *Schutte*, 613 N.W.2d at 376 (emphasizing that codefendant statement was not in response to police questioning); *Thomas*, 730 N.E.2d at 625. The Eighth Circuit thinks that statements made in response to a series of questions are fine, if the questions are not leading and the responses are in the form of a narrative. *United States* v. *Papajohn*, 212 F.3d 1112, 1120 (8th Cir. 2000). The Seventh Circuit will even allow a statement drafted by the government, and adopted by the codefendant, to be admitted against the defendant. *United States* v. *Centracchio*, 265 F.3d 518, 529 (7th Cir. 2001) (approving admission of codefendant's plea allocution despite fact that "prosecutor recited the actual content of the plea agreement and [the witness] just acknowledged with a short reply that he agreed with it").

In Michigan, Oregon, and Wyoming it is helpful if the codefendant was not given any reason to believe his statement to the police would result in lenient treatment. *Franco*, 950 P.2d at 352; *Schutte*, 613 N.W.2d at 376; *Brown*, 953 P.2d at 1179-80. In Illinois, it is helpful also, but perhaps not so harmful if the person offering the statement was "trying to gain favor or leniency." *Thomas*, 730 N.E.2d at 625 (reliability of such a statement is merely "diminished"). In Ohio, too, a statement made to the police after a promise of leniency would be unreliable, but if the police told the witness only that after he confesses the State might "cut him some slack," then the statement can be reliable. *State* v. *Marshall*, 737 N.E.2d 1005, 1009 (Ohio Ct. App. 2000). Such a hint, short of a promise of leniency, weighs heavily against admission in the Tenth Circuit. *United States* v. *Gomez*, 191 F.3d 1214, 1223 (10th Cir. 1999). A suggestion of leniency renders a statement unreliable in the Seventh Circuit, *United*

States v. *Castelan*, 219 F.3d 690, 695 (7th Cir. 2000), unless the statement that is made in the hopes of obtaining leniency is a plea allocution, in which case it is admissible, *Centracchio*, 265 F.3d at 529. The Second Circuit, too, routinely approves the admission of a codefendant's plea allocution, even though it is designed in part to generate more lenient treatment from the prosecution. *United States* v. *Dolah*, 245 F.3d 98, 105 (2d Cir. 2001).

The time lag between the witness's statement to authorities and the incident being described has also generated different views. The general view appears to be that the sooner the better, but how soon is soon enough? Michigan seeks the minimum time-lag. *Schutte*, 613 N.W.2d at 376 (expressing a preference for statements to investigating officers made "contemporaneously with the events referenced"). The Tenth Circuit will accept a statement made "soon after" the events being described occurred, *Gomez*, 191 F.3d at 1222-23, as will Colorado, *Stevens* v. *People*, 29 P.3d 305, 315 (Colo. 2001). In Illinois, the same day is good enough. *Thomas*, 730 N.E.2d at 626. The Second Circuit's plea allocution cases seem indifferent to the time lag between incident and statement. *Dolah*, 245 F.3d at 105 (citing cases).

Most courts insist that a statement to an investigating officer must be "genuinely incriminating," by which they appear to mean that it does not minimize the witness's role in the crime or attempt to shift blame to the defendant. *Stevens*, 29 P.3d at 315; *Brooks* v. *State*, 787 So.2d 765, 776-77 (Fla. 2001); *Gabow* v. *Commonwealth*, 34 S.W.3d 63, 78-79 (Ky. 2000); *Barrow* v. *State*, 749 A.2d 1230, 1244 (Del. 2000); *Earnest* v. *Dorsey*, 87 F.3d 1123, 1134 (10th Cir. 1996); *State* v. *Sheets*, 618 N.W. 2d 117, 124-25 (Neb. 2000); *Brown*, 953 P.2d at 1179 (admitting only portion of statement that was "equally incriminating" of defendant and codefendant). But as Petitioner's case rather dramatically illustrates, even this area of agreement is not uniform. For Sylvia Crawford's confession was admitted against the defendant despite the fact

that it unambiguously minimizes her own role in the crime as compared with Petitioner's insofar as it asserted that petitioner, and not Sylvia, stabbed the victim. To Washington, if confessions "interlock" it does not matter that the absent codefendant's confession shifts blame. See also *Wright* v. *State*, 440 S.E.2d 7, 9 (Ga. 1994). Likewise, and perhaps worse, the Wisconsin Court of Appeals has held that a murder suspect's statement to the police inculpating the defendant as the killer, thus shifting blame away from himself, was sufficiently reliable based only on the court's determination (drawn from the police officer's description of the suspect's demeanor when giving the statement) that the suspect was speaking with a truthful state of mind when he inculpated the defendant. *State* v. *Murillo*, 623 N.W.2d 187, 191-93 (Wis. Ct. App. 2000).

A variety of cases have also listed other factors. These factors include the specificity of the statement (the more specific the more reliable), *Stevens*, 29 P.3d at 317; *Gomez*, 191 F.3d at 1222-23; *Brown*, 953 P.2d at 1180, whether the person had a motive to distort the truth, *Crawford*, 54 P.3d at 661 n.3; *Stevens*, 29 P.3d at 317-18; *Gomez*, 191 F.3d at 1222; *Schutte*, 613 N.W.2d at 376, whether an attorney was present when the statement was given (if the attorney is present, more reliable), *People* v. *Campbell*, 721 N.E.2d 1225, 1230 (Ill. Ct. App. 1990), and whether the person was mentally unstable when giving the statement to the police, *Stevens*, 29 P.3d at 318.

The multiplicity of factors relevant to the reliability inquiry serves only to make the inquiry more malleable. The Colorado Supreme Court's decision in *Stevens* illustrates the point dramatically. Though the court said that the closeness in time of a statement to the police and the incident described points toward a statement's reliability, as does the spontaneity of the statement, the court in that case found reliable a statement made in response to leading questions from the police more than two years after the crime took place because

the statement was highly detailed and the court was unable to detect any significant motive for the codefendant to inculpate the defendant. 29 P.3d at 316-18. And comparing the Seventh Circuit's decisions in *Centracchio* and *Castelan* indicate how on one day a factor can be decisive, *Castelan*, 219 F.3d at 695 (suggesting that if statement is made in hopes of obtaining leniency, it is unreliable), but on another day it can be pushed aside, *Centracchio*, 265 F.3d at 529 (acknowledging that codefendant's plea allocution was made in hopes of obtaining leniency, but admitting it against defendant anyway). The shifting use which the courts make of the lengthy list of factors potentially relevant to the reliability inquiry undermines confidence in the ability of *Roberts* actually to ensure the trustworthiness of the statements being admitted against defendants.

The reliability framework *Roberts* imposed on the Confrontation Clause has thus failed in its principal objective: to provide "certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66. With hundreds of trial courts around the nation applying varying vague sets of criteria subjectively to malleable sets of facts, the *Roberts* framework produces the antithesis of certainty. In fact, *Roberts* in practice is less a framework than a hope. Specifically, the *Roberts* framework expresses a hope that trial courts, reviewing the specific facts of the cases before them from their position close to the evidence and the parties, would be able to distinguish between reliable and unreliable evidence, and thus promote accuracy in the trial process. *Wright*, 497 U.S. at 822 (stating "courts have considerable leeway in their consideration of appropriate factors").

The *Roberts* framework assumed that lower courts would settle on criteria that would be readily and consistently applied. But it has not. As described above, trial courts and appellate courts, federal and state courts, are apt to gauge the reliability of the same facts differently. This places an unnecessary strain on the criminal justice process as the

parties and the court spend time and resources trying to decide whether a codefendant's confession was sufficiently reliable to be admitted.

The multi-factored reliability approach *Roberts* imposed turns every effort by the prosecution to admit hearsay testimony under the residual trustworthiness prong of *Roberts* into a time consuming and potentially complicated pre-trial hearing. If an unavailable witness's demeanor, voluntariness, and motive for lying, among other things, are all relevant for determining the admissibility of his out-of-court statement, then the trial court would have to acquaint itself with all the circumstances surrounding the statement before ruling on its admissibility. That task is made especially difficult because the witness himself or herself is, by definition, unavailable. Instead, the trial court must rely upon the individual who heard or recorded the out-of-court statement to recite not only what was said, but detail all the nuances that play a part in evaluating credibility, a process that hardly inspires confidence. See, *e.g.*, *Murillo*, 623 N.W.2d at 191-93. In some cases, this pretrial hearing can balloon into a mini-trial in which the trial judge is forced to determine whether the accusation contained in the out-of-court statement is itself true before deciding whether to permit the jury to hear it. Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 Geo. L.J. 1011, 1027-28 (1998).

The trial process is further burdened by the heightened prospect of error, and consequent appellate reversal, that a subjective rule entails. Without meaningful objective bases for analysis, trial courts are in a weak position to predict how appellate courts will view the reliability of a particular statement in light of all the reliability factors. Appellate reversal will often require retrial, a heavy burden on the judicial system.

The *Roberts* framework imposes these strains on the criminal justice system without producing any increase in the confidence of the truthfinding process. The subjective

evaluation of reliability by a judge is no substitute for the time-honored process of adversarial testing. It is time to abandon *Roberts*.

C. The Testimonial Approach Provides Greater Certainty And Is More Consistent With The Text And Values Of The Confrontation Clause.

Three members of this Court have already indicated that they are willing to review whether the *Roberts* approach should be abandoned. *Lilly*, 527 U.S. at 142-43 (Breyer, J., concurring); *White*, 502 U.S. at 365-66 (Thomas, J., concurring, joined by Scalia, J.). A variety of legal scholars, too, believe the *Roberts* framework ill serves the purposes of the Confrontation Clause. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. Rev. 537, 619 (2003); John G. Douglass, *Confronting the Reluctant Accomplice*, 101 Colum. L. Rev. 1797 (2001); Friedman, *supra*; Akhil R. Amar, *The Constitution and Criminal Procedure* 130-31 (1997); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557 (1992). *Amici* respectfully suggest that this Court take this opportunity to adopt a new framework that makes the common cases easy to resolve and that preserves the values of the Confrontation Clause.

The Confrontation Clause should be read to prohibit the admission of any out-of-court *testimonial* statement unless the defendant has the opportunity to confront the witness. Not every statement uttered, and later used at trial, is *testimonial*. As discussed below, an out-of-court statement is *testimonial* only when the circumstances indicate that a reasonable declarant at the time would understand that the statement would later be available for use at a criminal trial. This understanding of the Clause flows naturally from the paradigm of the *ex parte* affidavit that the Confrontation Clause was designed to prevent. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. Pa. L. Rev.

1171, 1240-41 (2002). If the most fundamental point of the Confrontation Clause is to prevent the State from securing a conviction on the basis of witness testimony provided to it in private, without providing the defendant the opportunity to confront the witness, then defining the category of excluded statements to encompass that evil serves the purpose of the Clause perfectly.

This approach derives not only from the purposes the Confrontation Clause was meant to serve. It also fits the language of the Confrontation Clause better than the *Roberts* reliability-based approach and finds support in the results of this Court's caselaw, if not its reasoning. This Court's decision in *Roberts* was driven in part by a concern that if the Confrontation Clause's language were "read literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial." *Roberts*, 448 U.S. at 63; *Craig*, 497 U.S. at 849. This fear is born of a misreading of the term "witness" in the Confrontation Clause. While every person who appears in court is a "witness," not every statement made outside of court is made as a "witness," even if it is later introduced into evidence at a trail.

This Court's caselaw readily provides examples of out-of-court statements by individuals given not as a "witness" to a crime, but rather as a medical patient, *White*, 502 U.S. at 350, or a coconspirator furthering a conspiracy, *Bourjaily* v. *United States*, 483 U.S. 171 (1987); *United States* v. *Inadi*, 475 U.S. 387, 400 (1986); *Wright*, 497 U.S. at 820 (discussing excited utterances). Such statements, at least at the time they are made, are unrelated to any criminal investigation, and hence should not be understood to be statements by a "witness."[3]

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[3] Further, the Confrontation Clause does not absolutely bar the admission of an out-of-court testimonial statement. It only bars such statements when the accused is denied his right to confront the witness. Thus, the testimonial approach does not threaten the long line of cases,

On the other hand, when an individual, especially one suspected of a crime, approaches law enforcement officials, and provides information incriminating another individual (and even perhaps himself or herself), that individual has assumed the role of "witness" within the meaning of the Confrontation Clause. For that person has spoken under circumstances which he or she should reasonably expect will lead the State to punish the accused person. And it is that statement—suggesting that the State should condemn the accused as a criminal and restrain his or her liberty—that the Confrontation Clause insists must run the rigors of adversarial testing in open court. This Court's consistent refusal to permit absent codefendant confessions to be admitted against an accused fits comfortably within the testimonial approach as defined here. *Lilly*, 527 U.S. at 137 (plurality opinion); *Cruz*, 481 U.S. at 193-94; *Lee*, 476 U.S. at 545; *Bruton*, 391 U.S. at 133-34; *Douglas*, 380 U.S. at 419. Likewise, this Court's decision in *Wright*, which involved a victim's statement to a pediatrician who was acting not as a treating physician (as in *White*), but as an investigator fits the testimonial approach as well. Accepting the testimonial view, then, would not require this Court to alter the results of any of its prior cases, just this Court's, and, most critically, the lower courts', reasoning going forward.

Finally, beyond textual and historical coherence, beyond its ability to better serve the values of the Confrontation Clause, the testimonial rule produces more reliable and consistent results. As already noted, the all too typical case involving a codefendant's confession implicating the defendant becomes easy to resolve consistent with the historical exclusion of such statements.

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dating back to *Reynolds* v. *United States*, 98 U.S. 145, 158-61 (1878) and *Mattox*, 156 U.S. at 240-44, involving the admission at trial of prior testimony when the defendant previously confronted the witness.

Further, it becomes much easier to predict the outcomes of cases under this approach based on the knowledge of a very few set of objective facts. By and large, statements made to law enforcement officials about a crime will be testimonial. And by and large, statements made to friends, relatives, accomplices or anyone outside of criminal justice system will not be testimonial.

There will be exceptions to these broad and general rules, of course. A witness to a crime may make a statement to a friend knowing that the friend will subsequently contact police. Such a statement is aimed at law enforcement and would therefore be testimonial. And calls to 911 call for some judgment in the application of the testimonial approach. Friedman & McCormack, *supra* at 1224-25. That is because 911 serves a dual role in our society. It is both a component of our law enforcement system (suggesting that statements to 911 are testimonial) and an emergency response system (suggesting that statements to 911 are not testimonial). Whether a particular statement made to a 911 dispatcher was testimonial would depend on which capacity the caller was using when contacting the system. The important point is that the difficult cases will be the exceptions, whereas under the *Roberts* framework difficult cases are common. Further, under *Roberts*, the resolution of the difficult cases is inherently subjective and turns on how a particular court weighs the relevant mix of facts, which in many cases point in opposite directions. Under the testimonial approach, the difficult cases are resolved by a more focused inquiry, and an objective one as well: what did the speaker reasonably believe would be done with his or her statement.

In the end, *amici* suggests that the practical benefits of abandoning *Roberts* for the testimonial approach counsel strongly in its favor. The kind of evidence that is too often erroneously admitted against criminal defendants can be devastating to a defense. A rule that reliably prevents such evidence from being introduced will enhance both the

administrative efficiency of the criminal justice system, and its fairness. In comparison to the prevailing alternative, it is clearly preferable.

CONCLUSION

The judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

DAVID M. PORTER
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
801 I Street, 3rd Floor
Sacramento, CA 95814
(916) 498-5700

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2500

JEFFREY T. GREEN*
ROBERT N. HOCHMAN
MATTHEW J. PRESS
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

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